

*United States Court of Appeals
for the Second Circuit*



APPENDIX

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75-1375

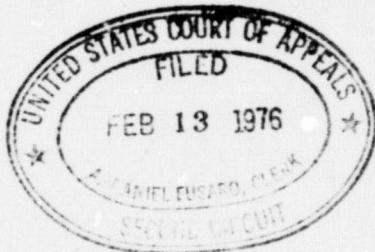
To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
Docket No. 75-1375
JOHNNIE A. NORMAN, :
Appellant. :
-----x

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOHNNIE A. NORMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

RICHARD A. GREENBERG,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

PPEAL
60
S. B. LOCKET

75CR 95

75 CR-491

EDWARD

ATTORNEYS

For U.S.A. Anion

THE UNITED STATES

JOHNNIE A. NORMAN and
Jehna-Pes-aka-Haak-H-

True name: HENRY CAIN, JR.
(Amended 3-28-75)

Court appt'd counsel:
For Defendant:

Robert Schmäkler

121 Schermerhorn St.
Brooklyn, NY.
834-1144

Did forge name of payee/páyable to another on U.S. Treasury Check

DATE

PROCEEDINGS

- | | |
|---------|--|
| 2-4-75 | Before Mishler, Ch J - Indictment filed |
| /13/75 | Before BRAMWELL, J.- Case called- Deft not present- Counsel present- Pl adjd to 2/20/75 at 2:00 P.M. |
| 13/75 | Notice of readiness for trial filed |
| 2-20-75 | Letter filed dated 2-13-75 received from Chambers. |
| ?-20-75 | Before BRAMWELL J - case called - deft Norman & counsel J.Seybert of Legal Aid present -deft waives reading of the indictment and enters a plea of not guilty - case adjd to 3-31-75., for trial - bail set at \$5,000 P.R.B. - Bench Warrant ordered for deft JOHN DOE. |
| 22/75 | Bench Warrant issued. |
| 2/24/75 | Magistrate's file 75 M 289 inserted into CR file. |
| 3-28-75 | Before DOOLING - |

75 CR 95

PROCEEDINGS

counsel present - deft arraigned and enters a plea of not guilty - d to be released upon his execution of a P.R.Bond of \$1,000 -deft to appear 3-31-75 at 10:00 am to set a date for trial.	
3-28-75	Bench Warrant retd and filed - Executed.
3-28-75	Financial affidavit filed - placed in criminal folder.
3-28-75	By BRAMWELL, J - Order filed appointing counsel.
3/31/75	Before BRAMWELL, J.- Case called- Deft NORMAN not present-Counsel Legal Aid present-Deft CAIN present with counsel - case adjd to 6/16/75 at A.M. for trial- bench warrant ordered for deft NORMAN
4/1/75	Bench warrant issued (NORMAN)
6/20/75	Bench warrant retd and filed- executed(NORMAN)
6/20/75	Before Bramwell J - Case called - Dfe. brought into Court on Bench Warrant - Deft. & xxxxxx JOHNNIE NORMAN & counsel Joanna Seybert present. Deft. arraigned and enters a plea of not guilty. - Deft. O.I and case set down for trial for July 23, 1975 at 10:00 A.M.
7/11/75	75 M 515 is inserted in CR file.
7-23-75	Before BRAMWELL, J - case called - deft NORMAN & counsel Joanna Seybert of Legal Aid present - superseding Information is withdrawn.
7-25-75	Original indictment 75 CR 75 is set for trial on July 28, 1975.
7-28-75	Stenographers transcript filed dated July 23, 1975 (NORMAN)
7/28/75	Stenographers transcript filed dated June 16, 1975.
7/28/75	Before BRAMWELL, J.- Case called- Adjd to 7/30/75 for trial CAIN JR.
7-30-75	Before BRAMWELL, J - case called - deft/& counsel J.Seybert of Legal Aid present - case adjd to Sept. 8, 1975 for trial @ 10:00 am.
8-13-75	Before BRAMWELL, J - case called - deft & counsel Robert Schmukler present - xxxxxx On motion of Asst. U.S. Atty. Marks the Indictment is dismissed. Motion granted. (CAIN JR)
8-13-75	By BRAMWELL, J - Order of dismissal filed. (CAIN JR)
9-2-75	Before BRAMWELL, J - case called - deft NORMAN & atty Joanna Seybert of Legal Aid present - trial ordered and begun - jurors selected and sworn - Govt rests - deft moves for Judgment of acquittal etc. motion denied with leave to renew - trial contd to 9-3-75.
9-3-75	Before BRAMWELL, J - case called - deft & counsel Joanna Seybert of Legal Aid present - trial resumed - defts motion to suppress is denied. Govts motion to reopen its case - motion granted - Govt rests - tri contd to 9-4-75 at 2:00 PM.
9-4-75	Before BRAMWELL, J - case called - deft & counsel present - trial

CRIMINAL DOCKET

DATE

PROCEEDINGS

Very came into court at 6:30 PM and Jury was sent home to return on 9-5-75 at 9:30 am.

- 9/5/75 Before BRAMWELL, J. - Case called- Deft and counsel present-Trial res. Jury resumes deliberations-Jury returns and renders a verdict of g. Jury polled-jury discharged-trial concluded-all motions by 9/19/75 contd and sentence adjd without date
- 9/5/75 By BRAMWELL, J. - Order of sustenance filed
- 9-19-75 Before BRAMWELL, J - case called - deft & atty Joanna Seybert present - oral motion of deft to set aside verdict and to renew all motions made during trial etc. - motion argued -motion denied (NORMAN)
- 10-17-75 Before BRAMWELL, J - case called - deft NORMAN not present - counsel J Seybert of Legal Aid present - sentence adjd to 10-24-1 at 10:00 am on consent.
- 10-24-75 Before BRAMWELL, J - case called - deft Norman & atty J. Seybert present - deft sentenced to imprisonment for 2 years - execution of sentence is suspended and the deft is placed on probation for 3 years. Special condition of probation:"that the deft seek and receive treatment for alcoholism under the direction of the Probation Dept." Deft advised of his right to appeal.
- 10-24-75 Judgment & Order of probation filed - certified copies to Probation (NORMAN)
- 10-24-75 Notice of Appeal filed. (no fee)
- 10-24-75 Docket entries and duplicate of Notice mailed to the C of A and Form A. (NORMAN)
- 10-24-75 By BRAMWELL, J - Order filed that Dr. M.Joseph , a witness subpoenaed by the deft to appear in the above action on 9-4-75 pursuant to Rule 17(b) FRCP and having appeared on that date, be paid fees of a witness by the U.S.Marshal for the Eastern District of N.Y.
- 10-31-75 Voucher for compensation of counsel filed. (Norman)
- 11/5/75 Order received from Court of appeals that record be filed on or 12/10/75
- 12/10/75 Record on appeal certified and handed to Joan ^{ATTY} for delivery

A FEU CO.
to Joan ^{ATTY} for delivery
DATED 12/10/75
LEWIS
BY <i>J. F. H.</i>
DEPT.

TRP:CBA:ip
F.#751,134

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ FEB 4 1975 ★

UNITED STATES OF AMERICA
-against-

TIME A.M.
P.M. Cr. No.:
(T.18, U.S.C., §495 and §2)

JOHNNIE A. NORMAN and
JOHN DOE, a/k/a "Hank",

Defendants.

95

John N. Norman Jr.
FEB 4 1975

X

THE GRAND JURY CHARGES:

On or about the 5th day of March 1973, within the Eastern District of New York, the defendants JOHNNIE A. NORMAN and JOHN DOE, also known as "Hank", with intent to defraud the United States, did utter and publish as true United States Treasury Check No. 75,083,381 dated March 1, 1973, in the sum of Five Hundred and Twenty-six Dollars (\$526.00), payable to John Mansfield, upon which the name of the payee had been forged, knowing the payee's name to be forged. (Title 18, United States Code, Sections 495 and 2.)

A TRUE BILL.

Patricia Willis
Foreman.

Paul D. Drayton
UNITED STATES ATTORNEY

15 THE COURT: Thank you, Ms. Schwartz.
16
17 I'm about to charge the jury. If anyone wishes
18 to leave the courtroom they may do so now.
19 They may not leave during the charge.
20 Mr. Foreman, ladies and gentlemen of the
21 jury: We come now to the final stage of the
22 proceeding. The court will now charge you on
23 the law to be applied to the facts in the case.
24 As you may recall, I initially gave you a pre-
25 charge. As to the manner in which, the case would

1 be presented to you. I told you that most of
2 the evidence in the case would come in the form
3 of the testimony of the witnesses on that yo
4 were to pay special attention to the manner in
5 which the witnesses testified. I believe I
6 also instructed you that you would be the judges
7 of the facts in the case.

8 That being your sole province and that
9 your recollection of the facts after having heard
10 all the evidence in the case, the testimony of
11 the witnesses, the documentary proof, was to
12 control the determination of the issues. Likewise
13 at that time I told you that I would be the
14 judge of the law. This has not changed at this
15 stage of the proceeding. I will not review the
16 facts of the case for you as you have just
17 heard the summations by the attorneys and there
18 is no need for a review of the facts.

19 In any event, if you find that there is
20 some fact in the case that you may have forgotten
21 or don't recollect or you can't agree with
22 each other in your deliberations, you can
23 have it read back from the record and that will,
24 I'm sure, refresh your memory. In any event,
25 I am the judge of the law and you must accept

what I say to be the law in this case. The
court has admitted according to the rules,
the attorneys to make opening statements and
summations to you. Under no circumstances are
the statements they have made by way of opening
or by way of summation to be taken as evidence.
However, the court and the law does permit you
to take the argument that they have professed
before you and wave those arguments. If you
agree with what they have said either side of
the case, you may use those arguments in your
deliberations and in discussing the case with
each other. And try to convince one another as
to what the final determination shall be with
reference to the deliberations at hand.
If you feel that the arguments are not commensurate
with the testimony and the proof and the case
you may disregard them. The arguments are not
evidence and you need not wave them. However,
there are times when the arguments of the attorneys
will give you an insight as to something you may
have missed and you may discuss that portion of
it, if you so desire.
Now, of course, I also said to you that during
the trial the court will be the judge of the law.

1 Likewise, as to motions which at times we had
2 at the side bars, as you may recall, that was
3 not for the purpose of keeping any of the proof
4 from you, but were matters of law that were
5 discussed between the attorneys and the court.
6 It should not have come before you

7 In any event, if you feel that you have
8 discovered by some breach of your imagination
9 what this court thinks as to either some of the
10 testimony or the case itself, you should remove
11 that from your mind because I tell you here and
12 now, I have come to no conclusion in this
13 case, nor have I indicated to you in any way
14 whatsoever what my feelings are with reference
15 to the facts in the case or with reference to the
16 guilt of the defendant. That is your province
17 and your job. You should not try to weigh
18 what you believe the court's impressions may be.

19 Understand that the lawyers who appear before
20 you are advocates of law. They are advocating
21 the best case they can for the parties they
22 represent and they have a right to exercise as
23 much forcefulness as they desire in their
24 questioning or otherwise, in presenting their
25 case. I say this because this is within the

1 framework of the ordinary trial. In determining
2 the facts, the jury is reminded that before each
3 member was accepted and sworn to act as a juror,
4 it was he or she, was asked questions regarding
5 his or her competency, qualifications, fairness
6 and freedom from prejudice or sympathy. On the
7 face of those answers, the jury was accepted
8 by the parties. Therefore, those answers are
9 as binding on each of the jurors now as they
10 were then and should remain so until the jury is
11 discharged from consideration of this case.

12 You cannot decide that you do not like the
13 sections of law that I will quote to you or any
14 other part of the charge. You have the obligation
15 of accepting the law as I charge you. Just as
16 I have the obligation of accepting your findings
17 of the facts in your ultimate verdict as to the
18 guilt or innocence of the defendant.

19 As to the charge before the court, it lends
20 for predictability and stability if judges
21 throughout the country in types of charges such
22 as this, charge you uniformly or substantially
23 so. And the jurys accepted. It would be unfair
24 for you to decide this case on your own notions
25 of what the law should be. Another jury decide

on their own notions of what the law should be;
this is considered the obligation as a firm one.
One that you should understand. Of course, you
know by this time that this case has come before
you by way of an indictment presented by a
grand jury, sitting in this eastern district.
That indictment charges the defendant with the
counts I shall now read to you; remember the
indictment is merely an accusation. Merely
a piece of paper. It is not evidence and it is
not proof of anything. The indictment reads
as follows: "On or about the fifth day of March,
1973, within the Eastern District of New York,
the defendants Johnnie A. Norman and John Doe,
also known as Hank, with intent to defraud
the United States, did utter and publish as true,
the United States Treasury check #75083381, dated
March 1, 1973. In the sum of \$526.00, payable
to John Mansfield. Upon which, the name of the
payee, had been forged. Knowing the payee's
name to be forged, in violation of title 18,
sections 495 and 2."

This code provides in part as follows:
"Whoever falsely names, alters or gives or
counterfeits any writing for the purpose of

1 obtaining or receiving or of enabling any other
2 person, either directly or indirectly to obtain
3 or receive from the United States, any offices
4 or agents thereof, any sum of money or whoever
5 utters or publishes as true, any such false,
6 forged or altered or counterfeited writing with
7 the intent to defraud the United States is
8 knowing the same to be false, altered, forged
9 or counterfeited, shall be guilty of an offense
10 against the laws of the United States".

11 Those are the essential elements of the
12 offense charged in the indictment. Each of which,
13 the government must prove beyond a reasonable
14 doubt that on or about March 5, 1973 in the
15 Eastern District of New York, the defendant
16 Johnnie Norman uttered and published as true
17 United States Treasury check #75083381, dated
18 March 1, 1973. Payable to John Mansfield in the
19 amount of \$526.00; second, that the defendant
20 did such act with knowledge that the payee,
21 Johnnie Mansfield endorsement on the back of
22 said check was a forgery; third, that the endorse-
23 ment of the payee John Mansfield was forged; and
24 four, that the defendant did such act willfully
25 and with the intent to defraud the United States.

1 And as stated before, the burden is always upon
2 the government to prove beyond a reasonable
3 doubt every essential element of the crime
4 charged. The law never imposes upon a defendant
5 in a criminal case the burden of duty of calling
6 any witnesses or producing any evidence. Please
7 bear in mind any following definitions in
8 consideration, the essential element of the crime
9 charged. Writing, what included the term
10 writing is used in the statute just read,
11 included a check drawn on the Treasury of the
12 United States. Forgery, define the writing of
13 a piece of paper, is an endorsement on a genuine
14 United States Treasury check by a person other
15 than the payee. If done willfully and without
16 another and with intent to defraud, is a forgery
17 within the statute. Utter, define, the phrase
18 utter or publish as true as used in the statute,
19 means to make or attempt any use of a written
20 or printed instrument or document. Such as an
21 attempt to place a check in circulation. Whereby
22 or in connection with, which some assertion
23 representation or claim is made to another in
24 some way or manner, directly or indirectly
25 expressly or implied or by word or conduct that

1 the check or document is genuine.

2 Intent to defraud define, the evidence
3 in the case need not establish that the United
4 States or anyone else was actually defrauded,
5 but only that the accused acted with the intent
6 to defraud. To act with intent to defraud means
7 to act with a specific intent to deceive or check
8 or lie for the purpose of either cashing
9 some financial loss to another or bringing about
10 some financial gain to one's self. Willfully
11 to act, an act is done willfully if done
12 voluntarily and intentionally and with the specific
13 intent to do something the law forbids; that is,
14 do say with bad purpose either to disobey or
15 to disregard the law. Definition of a specific
16 intent; the crime charge in this case is a serious
17 crime which requires proof of specific intent.
18 Before a defendant can be convicted a specific
19 intent as the term implies, means more than the
20 general intent to commit the act. To establish
21 specific intent, the government must prove that
22 a defendant knowingly did an act that the law
23 forbids.

24 Purposely intending to violate the law. Such
25 intent may be determined from all the facts and

circumstances surrounding the case. Intent
ordinarily may not be proved directly. Because
there is no way of scrutinizing the operations
of the human mind. But you may infer the
defendant's intent and the surrounding
circumstances. You may consider any statement
made, an act done or omitted by a defendant.

At all of the facts and circumstances in
evidence which, indicate his state of mind.

It is ordinarily reasonable to infer that
a person intends the natural and probable
consequences of acts knowingly done or knowingly
omitted. Knowingly, an attack, an act, an act
is done knowingly, if done voluntarily and
intentionally, not because of mistake or accident
or other innocent reason. Although intoxication
or drunkenness alone will never provide a legal
excuse for the commission of a crime, the fact
that a person may have been intoxicated at the
time of the commission of the crime, may negate
the existence of a specific intent. So evidence
that a defendant acted or failed to act while
in a state of intoxication is to be considered
in determining whether or not the defendant
acted or failed to act with specific intent as

1 charged.

2 The jury may find that the defendant was
3 or was not intoxicated on the evidence that has
4 been submitted. If the evidence leaves the
5 jury with a reasonable doubt whether because of
6 the degrees of his intoxication, the mind of the
7 accused was capable of forming or did form specific
8 intent to commit the crime charged, a jury should
9 acquit the accused. Proof of guilt, knowledge
10 of the falsity of the representations made is
11 seldom susceptible of proof by direct testimony.
12 It is impossible to look into a person's mind
13 to ascertain what his knowledge or intent was.
14 Consequently, the proof of this element of
15 knowledge may arrest as it frequently must,
16 on evidence of facts and circumstances from which
17 any jury may draw the only reasonable and logical
18 inference to be drawn therefrom.

19 In reaching its conclusion upon this issue
20 the jury has a right to consider all of the
21 circumstances surrounding the particular defendant's
22 situation. And his declarations, conduct and
23 information received by him.

24 Aiding and abetting is dealt with in section
25 2 of title 18 of the United States code. Which

1 reads as follows: "Whoever commits an offense
2 against the United States or aids and abets
3 conspires, commands, induces or procures its
4 commission, is punishable as a principal. Whoever
5 willfully, causes an act to be done which if
6 directly performed by him or another would be
7 an offense against the United States, is
8 punishable as a principal."

9 Thus, the guilt of a defendant may be
10 established without proof that the accused
11 personally did every act constituting the offense
12 charged. In other words, every person who
13 willfully participates in the commission of a
14 crime may be found to be guilty of that offense,
15 participation is willful if done voluntarily
16 and intentionally and with the specific intent
17 to do something the law forbids. Or with the
18 specific intent to fail to do something which
19 the law requires to be done. That is to say,
20 with bad purpose, either to disobey or to
21 disregard the law. Aiding and abetting define,
22 in order to aid and abet another to commit a
23 crime, it is necessary that the accused willfully
24 associate himself in some way with the criminal
25 venture and willfully participate in it. As he

would, in something he wishes to bring about.
That is to say, that he willfully seeked by some
act or omission of his, to make the criminal
venture succeed. An act or omission willfully
done if done voluntarily, and intentionally,
and with the specific intent to do something
the law forbids or with the specific intent to
fail to do something the law requires to be done.

That is to say, with bad purpose either to
disobey or to disregard the law.

Of course, you may not find the defendant
guilty unless you find beyond a reasonable doubt
that each and every element of the offense
as defined in these instructions was committed
by some person or persons. That the defendant
participated in its commission. Mere presence,
is not sufficient. Mere presence at the scene
of the crime and knowledge that a crime is
being committed are not sufficient to establish
the defendant aided and abetted the crime unless
you find beyond a reasonable doubt. That the
defendant, was a participant not merely a knowing
spectator. Reasonable doubt; now there are in
many ways, two types of evidence from which
a jury may properly find a defendant guilty of a

Defendant is presumed innocent of the crime
and thus the defendant although accused, begins
the trial with a clean slate and with no evidence
against him. And the law permits nothing but
legal evidence to be presented before a jury
to be considered in support of any charge against
the accused. So that the presumption of innocence
alone, is sufficient to acquit a defendant unless
you, the jury, are satisfied beyond a reasonable
doubt of the defendant's guilt after careful and
impartial consideration of all the evidence in the
case. It is not required that the government
prove/guilty on all possible doubt. The test is
one of reasonable doubt and reasonable doubt is
doubt based upon reason and common sense. The

kind of doubt that would make a reasonable person
hesitate to act.

Proof beyond a reasonable doubt must therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs. You the jury, will remember that the defendant is never to be convicted on mere suspicions or conjecture. The burden is always on the prosecution to prove guilt beyond a reasonable doubt. This burden never gets to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. So if the jury views the evidence in the case as reasonably permitting either of two conclusions; one, of innocence and the other of guilt, you the jury, should, of course, adopt the conclusion of innocence.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence and I have said direct evidence is the testimony of one who asserts actual knowledge of a fact such as an eyewitness. Also circumstantial evidence is proof of a change of facts and

9 The testimony of the witnesses, the documents
10 offered into evidence and reasonable inferences
 which can be drawn from the proven facts.

An inference is a deduction or conclusion which
reason and common sense leads the jury to draw
the facts which have been proved. You are to
consider only the evidence in the case. But
in your consideration of the evidence, you are
not limited to the statements of the witnesses.

On the contrary, you are permitted to draw from
the facts which you find have been proved such
reasonable inferences as seem justified in the
light of your own experience.

22 A reasonable doubt may arise not only from
23 the evidence produced, but also from a lack of
24 evidence. Since the burden is on the prosecution
to prove the accused guilty, beyond a reasonable

1 doubt, a very essential element of the crime
2 charged, a defendant has the right to rely upon
3 failure of the prosecution to establish such
4 proof.

5 Credibility of witnesses; you as jurors
6 are the sole judges of the credibility of the
7 witnesses and the weight their testimony deserves.
8 And it goes without saying that you should
9 scrutinize all the testimony given. The
10 circumstances under which each witness testified
11 and every matter in evidence which tends to
12 show whether a witness is worthy of belief.

13 Consider each witness's intelligence, motive,
14 and state of mind. His demeanor, his or her
15 demeanor and manner while on the stand. Consider
16 the witness's ability to observe the manner as
17 to which he or she has testified and whether he
18 or she impresses you as having an accurate
19 recollection of these matters. Consider also
20 any relationship each witness may bear to either
21 side of the case. The manner in which each
22 witness might be affected by the verdict and the
23 extent to which, if at all each witness either
24 supports or is contradicted by the other evidence
25 in the case. Inconsistencies or discrepancies

1 in the testimony of the witnesses or between
2 the testimony of the different witnesses may
3 or may not cause the jury to discredit such
4 testimony. Two or more persons witnessing an
5 incident or transaction may see or hear it
6 differently. An innocent misrecollection like
7 failure of recollection is not an uncommon
8 experience.

9 In weighing the effect of a discrepancy
10 always consider whether it is of importance or
11 unimportant detail. And whether the discrepancy
12 results from innocent error or intentional
13 falsity. After making your own judgement, you
14 will give the testimony of each witness such
15 credibility if any, as you may think it deserves.
16 Another test that you can use in determining
17 the truthfulness or credibility of a witness,
18 is to use your own good common sense in addition
19 to these essentials that I have given to you.
20 You can use your good common experience as you
21 do in your everyday experience where you must
22 make important decisions based upon what others
23 tell you. When you decide to either accept or
24 ignore the statements of others, you use your
25 common sense. Your judgement will say to you

1 somehow or other that whatever they say is not,
2 does not appear to be truthful. That somehow
3 or other you just do not believe that they have
4 said. That is your ability to reason and your
5 ability to determine the truthfulness of the
6 person you are speaking with.

7 Likewise, your common experience should
8 be used to determine the weight to be given
9 the testimony of a witness. You take that
10 same common experience into the jury room. You
11 do not leave it outside. And in addition to what
12 I have said, use your common sense as a test in
13 exercising your good judgement and good determina-
14 tion whether or not this defendant is guilty
15 of the crime charged. It is for you to determine
16 whether the witnesses in this case have testified
17 truthfully and whether or not they have an
18 interest in the case. And what that interest may
19 be, how great it is, whether or not they have
20 told you falsehood. This is all for you to
21 determine. Every witness's testimony must be
22 weighed as to its truthfulness. If you find any
23 witness lie as to any material fact in the case,
24 then the law gives you certain privileges. One
25 of those privileges is that you have the right to

1 disregard the entire testimony of that witness.

2 If you find you can assist through that testimony
3 and determine which estimation is true and which
4 was false, then the law allows you to take the
5 portions which were true and weigh it. And
6 disregard those portions which were false.

7 That again, is within your prerogative.

8 The win of the evidence is not necessarily
9 determined by the number of witnesses, testifying
10 on either side. You should consider all the facts
11 and circumstances and evidence to determine which
12 of the witnesses are worthy of greater credence.

13 You may find that the testimony of a smaller
14 number of witnesses on one side is more credible
15 than the testimony of a greater number of
16 witnesses on the other side. You are not
17 obliged to accept the testimony if the testimony
18 is contradicted and the witness is not impeached.

19 You may decide because of the witness's bearing
20 and demeanor, because of the inherent probability
21 of his or her testimony or for other reasons,
22 sufficient to you that such testimony is not
23 worthy of belief. The government is not required
24 to prove the essential elements of the offense
25 as defined in these instructions by any particular

1 number of witnesses. The testimony of a single
2 witness may be sufficient to convince you beyond
3 a reasonable doubt of the existence of an
4 essential element of the offense charged. If
5 you believe beyond a reasonable doubt that the
6 witness is telling the truth.

7 The defendant takes the stand; when a
8 defendant in a case of this kind takes the
9 stand, which he has perfect right to do, he
10 is subjected to all the obligations of witnesses.
11 And his testimony is to be treated like the
12 testimony of any other witness; that is to say
13 it will be for you to say what the substance
14 of his testimony is and the manner in which he
15 gave it, his cross examination and everything
16 else in the case. Whether or not he told you
17 the truth. Then again, it is for you to remember
18 you have a perfect right to do so, the interest
19 of the defendant, the interest, the defendant
20 has in this case. As he placed himself as a
21 witness, he stands like any other witness.
22 Where a witness is a defendant on a trial in
23 a case, and by such statement or other conflict,
24 the defendant admits some facts against his
25 interest, then the statement or other conducts

if knowingly made or done, may be considered
as evidence of the truth of the fact so admitted
as well as for the purpose of judging the
credibility of the defendant as a witness.

An act or omission knowingly done if done
voluntarily, intentionally, not because of
mistake or act or other innocent reason, evidence
that at some other time a witness other than the
accused has said or done something or has failed
to do or say something which is inconsistent
with the witness's testimony, at the trial, it
may be considered by the jury for the sole purpose
of judging the credibility of the witness. But may
never be considered as evidence or truth or
proof of the truth of any such statement.

Judging the evidence, there is nothing peculiarly
different in the way the jury receives the evidence
in a criminal case from that which all reasonable
persons treat any questions depending upon the
evidence presented to them.

You are expected to use your good sense
and consider the evidence in the case which has
been admitted. Give it a reasonable and fair
construction in the light of your good common
sense as human beings. If an accused be prove

1 guilty beyond a reasonable doubt say so. If
2 not so prove guilty, say so. Keep constantly
3 in mind that it would be a violation of your
4 sworn duty to base a verdict of guilt upon any-
5 thing other than the evidence in the case. And
6 remember as well that the law never imposes
7 upon a defendant, in a criminal case, the burden
8 of or duty of calling any witnesses or producing
9 any evidence. The jury's recollection controls.
10

11 If any reference by the court or by counsel to
12 of evidence does not coincide with your
13 own recollection, it is your recollection that
14 which should control your deliberations. Punish-
15 ment on your oath as jurors, you cannot allow
16 consideration of the punishment which may be
17 inflicted upon the defendant if convicted.
18 To influence your verdict in any way, or any
19 sense enter into your deliberations, the duty of
20 imposing sentence rests exclusively upon the
21 court.

22 Your function is to weigh the evidence in
23 the case and to determine the guilt or innocence
24 of the defendant. Solely upon the basis of such
25 evidence and the law. You are to decide the case
upon the evidence and the evidence alone. And

1 you must not be influenced by any assumption,
2 or sympathy. Or any inference and
3 not warranted by the facts until proven to your
4 satisfaction.

5 Now in this type of case, there must be
6 a unanimous verdict which means that all twelve
7 of you must agree and it goes without saying
8 that it becomes incumbent upon you one another
9 to listen to each other's argument. Use your
10 good common sense. You have no right to stubbornly,
11 idly sit by and say, I am not talking to anyone.
12 Or to say, I am not going to discuss it. Because
13 people with common sense and the ability to
14 reason must communicate. They must communicate
15 their thoughts. So anything which appears in the
16 record about which one of you may not agree
17 talking out among yourselves and then, if you
18 can't agree as to what it is in the record, well,
19 you can ask the court to have that portion of the
20 testimony read back. You may do so, by giving
21 a note in writing to the clerk. Who will then
22 present it to the court and I will then bring
23 you into the courtroom. The foreman will preside
24 over your deliberations and will be your spokesman
25 here in court. He reporting your verdict to the

1 court, you will state the defendant is either
2 guilty or not guilty. Further, I may say to you
3 that in any deliberations there are certain
4 exhibits that are in evidence. You will take
5 those into the jury room with you and use those
6 exhibits during your deliberations.

7 Now having said that I think I shall excuse
8 the jurors number one and two. You are discharged
9 from this case with the thanks of the court.
10 The instructions are that you are to call the
11 jury clerk tomorrow afternoon on 596-3190.
12 The attorneys may come up to the side bar.

13 (A side bar discussion is held out of the
14 hearing of the jury.)

15 THE COURT: Any exceptions?

16 MS. SEYBERT: No, your Honor.

17 MS. SCHWARTZ: No, your Honor.

18 (The following takes place in the presence
19 of the jury.)

20 THE COURT: The clerk will swear in the
21 marshalls.

22 (The marshalls are sworn.)

CERTIFICATE OF SERVICE

Feb. 3 , 1926

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Jonathan J. Silberman